UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELCI STRINGER,	:	
	:	**Case No. C2-03-665**
on behalf of herself and all others similarly situated,	:	**Judge Holschuh**
	:	
Plaintiff,	:	**Magistrate Judge Abel**
	:	
v.	:	
	:	
NATIONAL FOOTBALL LEAGUE, et al.,	:	
	:	
Defendants.	:	

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff Kelci Stringer hereby moves for an order stating that this case shall be maintained as a class action, pursuant to Rule 23(b)(2), and that the class shall be defined as follows: All present and future NFL football players and their wives and next-of-kin. Plaintiff requests that she be appointed class representative or, if necessary, that she be given leave to propose a suitable substitute representative subject to court approval, and that the law firm of Waite, Schneider, Bayless & Chesley Co., L.P.A. be appointed class counsel. The grounds for this Motion are set forth below in the accompanying Memorandum in Support.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Korey Stringer, a 340-pound Minnesota Vikings offensive lineman, died on August 1, 2001 of complications from heat stroke following the second day of practice during that year's training camp. To understand why this case was brought as a class action, one first must understand what really happened to Korey Stringer during the first two days of the 2001 training camp.

A. What Really Happened To Korey Stringer

The following factual description is largely based on sworn testimony of Vikings personnel. The benefit of every doubt as to time is given to them.

1. Day One – Monday, July 30, 2001

Korey Stringer first became ill on the initial day of practice in Mankato, Minnesota, July 30, 2001. Approximately forty-five minutes into the afternoon practice that day, at a time when the heat index was at least 109 (the highest training camp heat index in at least ten years), he vomited multiple times on the practice field. He was not taken out of practice at the first sign of trouble that afternoon, or even after the first time he was seen vomiting.

According to his offensive line coach, Mike Tice, Korey started out practice "okay," but became sluggish. Tice noticed that he was slow getting back in line, was quiet and not his usual talkative self, and had a look of anguish on his face. Korey told Tice that his stomach was killing him, that his stomach was "just really bad." Tice told Korey to "get some water." Tice saw Korey doubled over and throwing up, making loud noises. It seemed to him that Korey was struggling. When Tice asked Korey if he was okay, Korey said yes. Tice did not take Korey out, but rather just kept an eye on him, even though Tice was worried that he really was not alright.

Korey threw up again in the fourth segment of the Monday afternoon practice, which concerned Tice because it was not a high energy period. Tice thought something was wrong. Korey was throwing up substantially. At that point, Tice called for an athletic trainer and removed Korey from practice. As head trainer Chuck Barta was walking toward Korey, Korey vomited again. Barta talked briefly with Korey, who again complained of an upset stomach. After about a minute or two, Korey vomited yet again. At that point, Barta insisted on escorting him to a trailer located just off the field. Barta walked inside the trailer with Korey. Fred Zamberletti, the Vikings

medical services coordinator, was already there assisting another player. Barta told Zamberletti that Korey had been vomiting and that he was being brought to the trailer "to cool down."

Between 5:00 and 5:15 p.m. on July 30, the Vikings' training camp physician, Dr. W. David Knowles, arrived at the practice field. Barta informed him there were two players in the trailer and asked him to "take a look at them." Dr. Knowles went inside the trailer. He claims he asked Korey how he was doing and that Korey responded that he was fine. A Vikings trainer who was present claims Dr. Knowles did not speak to Korey or to anyone about Korey. In any event, Dr. Knowles did not examine Korey at all. Nevertheless, he later would dictate the following note to Korey's medical record regarding their encounter on the afternoon of July 30: "The patient had an episode of heat exhaustion during afternoon training camp. He recovered without incident following rest and hydration." Dr. Knowles did not treat Korey for heat exhaustion or make any recommendations regarding recovery or limitations on his activities for that day or for subsequent days. After leaving the trailer, Dr. Knowles told Barta that "everything's okay."

2. Day Two – Tuesday, July 31, 2001

The National Weather Service forecast for the morning of July 31 included two "heat advisories" for Mankato predicting heat index values of 105 to 110, as well as a "weather message" for "dangerously hot and humid conditions," which stated that "extremely humid conditions will team up with hot weather to produce potentially life-threatening conditions." Eleven Vikings players, about thirteen percent of the team, would suffer heat illness that day, including Korey.

Between 8:00 and 8:30 on the morning of July 31, just prior to the start of practice, Korey told Barta he still had an upset stomach, a sign he had not yet recovered from the prior day's heat exhaustion. Barta gave him Tums, but did not perform any of the routine tests necessary to determine if Korey had recovered from heat exhaustion, including taking his temperature or assessing orthostatic blood pressure changes.

Despite the danger of heat stroke on the second day of heat exposure, the Vikings' coaches required the players to practice in full pads and uniforms, rather than cutting to shorts and upper pads or shorts and t-shirts. Dr. Knowles went to the Vikings training camp on the morning of July 31, but did not see or speak to Korey, or speak to anyone about Korey.

Practice began that morning at approximately 8:45. Barta did not instruct any of the athletic trainers to monitor Korey or his fluid intake during practice, and no athletic trainer actually was monitoring the offensive line on a continuous basis during the time when Korey was practicing that morning. The Vikings never gave their athletic trainers or interns any training or instruction in how to spot the signs or symptoms of heat illness; nor did the team inquire or investigate whether they had received such training elsewhere. The Vikings' team physicians never established any oral or written protocols for the athletic trainers to use in dealing with heat illness or emergencies.

At about 10:25 on Tuesday morning, Matt Birk, also a Vikings offensive lineman, was standing beside Korey and saw him vomit clear fluid. Apparently on a separate occasion that morning, assistant offensive line coach Dean Dalton also saw Korey throw up. Formal practice ended at 11:10 a.m. Barta gave his cell phone to assistant trainer Paul Osterman and told him to call the more senior Zamberletti in the athletic training room "if anything comes up." Barta went off with head coach Dennis Green to tend to a scrape on Green's leg. Osterman put the phone in his pocket. He never used it to call Zamberletti or Barta.

Korey did eight pass sets with the other offensive linemen (extra work required by Tice), then went down to one knee. Cory Withrow, another offensive lineman, asked Korey if he was okay. Korey grunted, but did not respond. Withrow asked if Korey wanted a trainer; he thought Korey shook his head no, but he was not sure. Korey walked 40 to 50 yards toward the blocking dummy known as "Big Bertha," which Tice required the players to hit multiple times in succession as yet another additional drill. At approximately 11:15 a.m., Korey collapsed on the field 20 to 30

feet from Big Bertha. He first rolled onto his right side, then onto his back, holding his stomach, then his head, and then throwing his arms over his head. According to photographer Billy Robin McFarland, who photographed Korey after his collapse, Korey was on the ground up to five minutes moaning quite audibly the entire time. A photograph taken by McFarland at approximately 11:15 a.m. shows Korey lying on the ground with pale blue palms and lips, while Barta and Green drive away on a cart. According to Withrow, he heard Korey panting and moaning on the ground. Birk asked Korey if he wanted an athletic trainer and Korey said "yes." Withrow thought to himself that "something is wrong" and called out "trainer."

At 11:20 a.m., Osterman, the assistant athletic trainer holding Barta's cell phone, and Dan Kearney, an intern athletic trainer, both responded. Kearney asked Korey how he was doing, but Korey did not respond. Like vomiting and an upset stomach, pallor and collapse are common signs of heat illness. Osterman, wearing sunglasses, claims he did not notice Korey's pallor. In fact, Osterman later said he doubted he could recognize when an African-American person is pale. Korey got to one knee, then got up off the ground and incorrectly struck Big Bertha only once. Accounts differ as to whether he stumbled away from Big Bertha and toward the trailer, or half-jogged over to it. In any event, Osterman directed him to the trailer, instead of to the athletic training room where there were ice pools for cooling.

At no later than 11:25 a.m., Korey entered the trailer and Osterman followed. Inside the trailer, which supposedly was kept at a constant 62 degrees, it was cool enough to fog Osterman's sunglasses. Kearney went to get water for Korey. Korey sat down on one of the two treatment tables. He and Osterman did not speak during Kearney's absence, and Osterman did nothing for him while waiting for Kearney. Between 11:25 and 11:30 a.m., Kearney arrived with the water. He stayed a minute or so, then departed to clean up, leaving Korey alone again with Osterman. Ten to fifteen minutes had elapsed since Korey had collapsed to the ground outside. Osterman said to

Korey, "You need to drink some water, Korey." Korey complied, drinking one or two sips. Korey got off the treatment table and lay down on the floor, his first movement inside the trailer. Osterman "let Korey relax" for ten minutes.

Between 11:35 and 11:40 a.m., ten minutes after Kearney left and while Korey was still on the floor, Korey sat up and asked Osterman to take off his shoes and socks and cut off his tape. Between 11:37 and 11:42 a.m., two minutes or "a little longer" after Korey asked Osterman to remove his shoes, Osterman completed the task. Korey said "Thank you." Those were the last words he would speak. Osterman noticed that Korey was still sweating more than 20 minutes after stopping his last exertion, but the trainer thought that "everything was normal."

Osterman did not consider placing ice on Korey or fanning him. No Vikings personnel ever used or considered using ice to cool Korey down. Osterman thinks that Korey drank some more water during this period. Korey got up off the floor and sat on the table again, his second movement inside the trailer. At approximately 11:47 a.m., Korey began humming to himself and bobbing his head back and forth. Osterman did not view this as evidence of Korey's altered mental status, a warning sign of heat stroke. Osterman did not engage in any conversation with Korey to test his mental status.

By the time Korey began humming, ten minutes "or longer" had elapsed since Osterman finished removing shoes, socks, and tape. At that point, Osterman called the athletic training room and asked one of the athletic trainers to bring the cart to pick up Korey and him. According to Osterman, it had been at least 20 minutes, "maybe more," since they entered the trailer. Korey's humming continued for a couple minutes. Osterman said, "Korey, we're going to bring the cart here and we're going to take you inside." Korey did not respond to that statement. Osterman said nothing else to him. Detachment in a hot athlete can be a warning sign of heat stroke, but Osterman did not interpret Korey's detachment as a sign of anything. Osterman claims he called for the cart

as a matter of procedure, not because he sensed that anything was wrong with Korey. Osterman waited at least twenty minutes in the trailer with Korey before he called for the cart and it took at least five to ten minutes for the cart to arrive.

In the meantime, Korey got off the treatment table and lay down on the floor again, his third movement inside the trailer. Korey, normally a friendly and very talkative person, had said nothing since "thank you" at least ten minutes earlier and had spoken only a few words in the entire half-hour they had been insider the trailer. Osterman did not view Korey's silence as a sign of his altered mental status. After a while, Osterman applied an ice towel to Korey's head, but Korey shoved it away without saying anything. Although a hot athlete's irritability can be a warning sign of heat stroke, Osterman did not attach any significance to Korey's action. At approximately 11:52 a.m., Kearney arrived with the cart. Osterman estimated that thirty minutes had elapsed since Osterman and Korey entered the trailer; he also estimated that five to ten minutes had elapsed since Osterman called for the cart. Osterman said, "Korey, the cart's here. Let's get up." According to Osterman, Korey was "unresponsive" and did not move, and, "That was the first sign that something was going wrong. . . . I really wasn't sure what was going on at that point. I was pretty confused." According to Kearney, Korey was unresponsive, but moved his head and arms slightly as if trying to lift them.

Osterman and Kearney tried to lift Korey, but could not do it. Osterman and Kearney rolled him onto his side. Osterman said to Kearney, "Hurry up. Get me some ice towels and go get Fred," referring to Zamberletti. At approximately 11:54 a.m., two to three minutes after Kearney had arrived at the trailer in the cart, Kearney got back onto the cart to retrieve Zamberletti. Osterman checked to see that Korey had a pulse but did not count the beats. According to Osterman, Korey's pulse was "weak" but "steady." Osterman did not take Korey's temperature or even consider taking it. According to Osterman, Korey was still sweating after thirty-five minutes in the trailer

and his skin felt "cool and moist." Contrary to popular belief, continued profuse sweating long after exercise ceases is a sign of heat stroke.

At approximately 11:57 a.m., Kearney and Zamberletti arrived back at the trailer. Korey's breathing was rapid and shallow. Zamberletti looked at Korey and said, "Oh, he's hyperventilating." Zamberletti thought Korey had "just fainted," or had had a seizure as a result of "an insect bite" or "some medication." Zamberletti instructed Kearney to put a zip lock bag over Korey's nose and mouth. Kearney complied, holding the bag there for one to one and one-half minutes. Thus, the already oxygen-deprived Korey was further deprived of oxygen. Holding the bag over Korey's nose and mouth while he already was struggling to breathe had a suffocating effect and caused him to suffer metabolic acidosis, which further attacked his brain cells and other organ tissues. According to Zamberletti, the bag worked because he saw Korey rise up on his knees and open his eyes. Zamberletti did not recognize this as "fight instinct." Kearney did notice any improvement in Korey's breathing as a result of the bagging.

Neither the Vikings nor their physicians had established any emergency plans or procedures; nor had they made any arrangements to get ambulance service. Zamberletti told Osterman to call Dr. Knowles. Osterman called Dr. Knowles' direct line, but he did not answer. Osterman then called Dr. Knowles' nurse and left a message with her. Osterman told Zamberletti, "I think we need to get him to the hospital." Zamberletti told Osterman to call for "the van." Osterman called a public relations intern to bring the van so that Korey could be taken to the hospital. Finally, at 12:00 p.m., Osterman called for an ambulance. While waiting for it to arrive, a period of approximately nine minutes, Zamberletti, Osterman, and Kearney did nothing to help cool Korey down or to give him any other aid. During the entire time that Korey spent with Vikings athletic trainers inside the trailer on July 31 (almost 50 minutes), no one there measured his vital signs or his temperature. Also, Korey was inside the trailer for at least 40 minutes with at least one athletic

trainer before an ambulance was called, even though Osterman had a cell phone in his pocket the entire time.

At 12:08 p.m., the ambulance arrived at the trailer. First contact with Korey was at 12:09 p.m. Korey was grunting and breathing rapidly, a sign that he was unable to protect his own airway. One EMT noted that he still was dressed in football pants and a t-shirt. The other EMT recalled that he was wearing uniform pants but was stripped to the waist. Korey was placed on a long backboard and was moved from the trailer to the ambulance. The paramedics determined that Stringer's life was in immediate danger, so a call was placed to the ambulance dispatcher, who in turn called the hospital to let them know that a patient would be arriving whose life was in immediate danger. At 12:18 p.m., the ambulance departed for the hospital, a distance of approximately two miles. En route to the hospital, Korey's pulse was measured for the first time. It was 140, more than an hour after he ceased all exertion.

At 12:24 p.m., the ambulance arrived at the hospital and pulled into the emergency room garage. While still in the ambulance, Korey began to vomit clear fluid (like water). He was tipped on his side to avoid aspiration. The ambulance was met by hospital personnel, and Korey was moved into the emergency room at Immanuel St. Joseph's Hospital. At 12:35 p.m., his rectal temperature was 108.8° F. He died approximately thirteen hours later. Despite exhibiting the signs and symptoms of serious heat illness over a two-day period, the sum total of the "treatment" that Korey received from Vikings personnel in that period consisted of Tums and the very harmful bagging procedure ordered by Zamberletti.

B. Why This Case Was Brought As A Class Action

Amazingly, NFL Commissioner Paul Tagliabue was quoted on March 19, 2002 as saying he was satisfied that Korey Stringer received "exemplary treatment" from the Vikings. (Exh. 1, p. NFL00466.) This case was brought as a class action because the abusive and inhumane conditions

and treatment to which Korey Stringer was subjected and which foreseeably led to his death – *i.e.*, being forced to participate fully in practices conducted in extreme heat and humidity while wearing unsafe, heat-retaining, league-mandated equipment, without proper acclimatization or supervision, and without suitable medical care – still are condoned and perpetuated by the NFL and ingrained in its culture, a dangerous culture that the League tolerates, fosters, and even markets. Even today, players on NFL teams are being subjected to the very same dangerous policies, practices, procedures, equipment, conditions, treatment and culture that claimed Korey's life. Yet, the NFL, both before and after his death, never acknowledged, confronted, or took action against those policies, practices, procedures, equipment, conditions, treatment, and culture – despite knowing that they exist, knowing the risks they pose, and possessing the ability to change them.

Long before Korey's death, the NFL prescribed practices and procedures on heat illness prevention and treatment for NFL teams to follow. (Exh. 2.) The day Korey died, the League distributed "talking points" to all teams, claiming that the Gatorade Sports Science Institute had found that "the teams were doing everything correctly."[1] But a study published by the Gatorade Sports Science Institute entitled "Heat Stroke in Sports: Causes, Prevention and Treatment" proves just the opposite. It proves beyond doubt that, when the NFL prescribed hot weather procedures for teams to follow, it did so negligently. And, given that the NFL has not changed its prescribed hot weather procedures since Korey died, its negligence continues to threaten the lives and livelihoods of players and their families. For example:

- The Gatorade study stated, "In studying 1,454 cases of heat illness in Marine-recruit training, researchers implicated heat stress on the prior day as a factor (*Kark* et al., 1996). So a prime time for heat stroke is the day *after* an exhausting and dehydrating day in the heat." (Exh. 3.)

[1] In the case brought by Korey's family against the Vikings, the "talking points" memorandum was produced pursuant to a subpoena but stamped "confidential" by NFL lawyers. Plaintiff's counsel do not believe it actually qualifies for confidential treatment under P&G v. Bankers Trust, 78 F.3d 219, 225 (6th Cir. 1996). In light of an earlier agreement with NFL counsel in that case, plaintiff's counsel will attempt to resolve this issue with NFL counsel before filing it.

The Gatorade study also stated that, for players suffering dehydration the prior day, "body temperature should be normal before the player takes the field. When in doubt, hold them out." The NFL's "Hot Weather Guidelines," however, do not mention when or under what conditions players should be allowed to return to practice after heat exhaustion. (Exh. 2.) That the NFL remains dangerously out of touch on this critical issue was further exemplified by Commissioner Tagliabue's deposition testimony on this subject during the suit brought by Korey's family against the Vikings. Referring to the heat exhaustion that Korey suffered on July 30, 2001, the Commissioner testified as follows:

> Q. Would you expect an NFL team physician, in order to diagnose heat exhaustion, to actually examine the player?
>
> ****
>
> A. I don't know.
>
> Q. Would you expect an NFL team physician, before pronouncing a player recovered from heat exhaustion, to actually examine the player?
>
> ****
>
> A. I don't know.
>
> Q. Would you expect an NFL trainer to follow up with a player who had been diagnosed as suffering heat exhaustion?
>
> ****
>
> A. I don't know.

(Exh. 4, pp. 50-51.)

- The Gatorade study stated, "Heat stroke is always a threat during hard drills on hot days, especially in hefty players in full gear." The study added, "So during a hard practice in full gear, heat stroke is possible at any combination of ambient temperature above 80º F (26.7º C) and relative humidity above 40% (Kulka & Kenney, 2002)." "Early warning signs of impending heat stroke may include irritability, confusion, apathy, belligerence, emotional instability, or irrational behavior." (Exh. 3.) The NFL's guidelines have never mentioned heat stroke, what weather conditions create the risk of it, how to prevent it, or how to recognize it. (Exh. 2.)

- The Gatorade study stated, "Lack of acclimation is a cardinal predictor of heat stroke in football." (Exh. 3.) The NFL's guidelines have never mentioned acclimation. (Exh. 2.)

- The Gatorade study stated, "The football uniform insulates players. As more gear is added – from shorts and shirt to pads and helmet to full uniform – players heat up faster, get hotter, and cool slower." (Exh. 3.) The NFL's guidelines say nothing about the risks posed by full uniforms; players merely are advised to "wet your uniform and skin whenever possible with cool water." (Exh. 2.)

- The Gatorade study stated, "The NFL has nearly 300 players who weigh 300 pounds or more, six times as many as a decade ago. Nor is extra fat the only bulk problem. When a 270-pound player adds 30 pounds of muscle, he can generate more heat, but he does not add enough extra surface area to shed that extra heat. So huge lineman can be heat bombs." (Exh. 3.) The NFL's guidelines mention nothing about giving special attention to heavier players. (Exh. 2.)

- The NFL's guidelines state, "Make certain the players take in enough water." (Exh. 2.) But according to the Gatorade study, "Heat stroke in football sometimes seems to hit with surprising speed. When this happens, a common theme of bewildered staff is, 'But he got lots of fluids.' The misconception is that hydration prevents heat stroke. The truth is that hydrating is critical but not sufficient to prevent heat stroke." (Exh. 3.)

- The Gatorade study stated, "Some football players are overmotivated by pride and driven by tough coaches. They believe no limits exist. They ignore warning signs." (Exh. 3.) That study added, "In football, focus on high-risk players. Spot subtle signs of physical of cognitive decline." (*Id*.) By mentioning nothing about monitoring players, the NFL's guidelines perpetuate the dangerous myth that players can self-monitor in hot conditions. (Exh. 2.)

- The Gatorade study stated, "In heat stroke, every minute counts. When core temperature is very high, body and brain cells begin to die, so fast cooling is vital." (Exh. 3.) The NFL's guidelines mention nothing about how teams should respond to heat stroke. (Exh. 2.) In a deposition in the Minnesota case, Commissioner Tagliabue testified: "Q. First of all, are you aware that time is critical in treating heat illness? . . . A. I don't know." (Exh. 4, pp. 79-80.)

- The Gatorade study stated, "Early features [of heat stroke] are subtle central nervous system (CNS) changes – altered cognition or behavior – and core temperature over 104-105º F (40.0-40.6º C). When an athlete collapses, the best gauge of core temperature is rectal temperature; oral, axillary, or ear-canal temperature will not do." (Exh. 3.) The NFL's guidelines call for teams to take the collapsed player's temperature orally or by "skin." (Exh. 2.)

- The Gatorade study stated, "Check the athlete every few minutes for rectal temperature, CNS status, and vital signs." (Exh. 3.) The NFL's guidelines never mention rectal temperature, CNS status, vital signs, or periodic checking. (Exh. 2.)

- The Gatorade study stated, "No faster way to cool exists than dumping the athlete into an ice-water tub. Submerge the trunk – shoulders to hip joints." (Exh. 3.) The NFL's guidelines say nothing about ice-water immersion. (Exh. 2.)

- The Gatorade study stated, "Send the heat-stroke athlete to the hospital after cooling." (Exh. 3.) The NFL's guidelines never mention the need to secure any medical care, let alone hospital care, for a player with heat illness. (Exh. 2.)

The same hot weather procedures prescribed by the NFL before Korey's death still are in effect. (Exh. 2.) Immediately after Korey died, Commissioner Tagliabue was quoted as promising that the League would "leave no stone unturned" as it studied his death and the NFL's response to it. (Exh. 5.) He added: "You can intellectualize about the risk of the game, you can understand all the risks theoretically, but you never expect to lose a player, have a player die playing the game. . . .

It's our obligation now to try to learn from that." (Exh. 6, p. NFL 00587.) Despite his initial promise, Commissioner Tagliabue testified in the Minnesota case that he "determined, at some point after August 7th of 2001, that the circumstances of Korey Stringer's death could, in all likelihood, best be explored by organizations other than the National Football League itself, including the Minnesota Vikings and the State of Minnesota." (Exh. 4, p. 23.) He further testified:

Q. Did any members of your staff or the NFL office reach any conclusions about the treatment that Korey – Korey Stringer received from the Minnesota Vikings?

****

A. I don't know.
Q. You don't recall that any member of your staff or the league office related to you any conclusions that they had reached about the quality of the treatment that Korey Stringer received from the Minnesota Vikings?
A. I am quite certain they didn't.

****

Q. And is there any person affiliated with the National Football League whose responsibility it is to reach a conclusion concerning the quality of the care that Korey Stringer received from the Minnesota Vikings?
A. Probably not, unless I designate such a person.
Q. And you haven't designated such a person up to now?
A. Correct.
Q. Is it your intention to designate such a person in the future?
A. No.

****

Q. Sir, why didn't the NFL conduct its own investigation into the death of Korey Stringer?

****

A. For a variety of reasons.
Q. Which include?
A. Which include the belief that other forums were better suited to do that.

****

Q. Why did you think that the Vikings, as the alleged wrongdoer, could conduct an investigation better than the NFL could?

****

A. I don't know whether I ever concluded that they could do it better than us. They were doing it and, therefore, I asked them to give us a report of what they were doing.
Q. Maybe I misheard you earlier. I thought you suggested earlier that there were other entities that could do a better job of investigating than the National Football League. Did I mishear you?
A. No. You heard me correctly.
Q. Okay. Is one of those entities the Minnesota Vikings?

A. I don't know.

****

Q. Have you ruled out conducting an investigation into the death of Korey Stringer on behalf of the NFL?

A. At this point, I don't see what purpose it would serve.

(*Id*. at 29-30, 94-95, 100-102.)

That the NFL Commissioner sees no need to investigate the death of an NFL player who developed heat stroke while practicing signals that nothing has changed or will change in the procedures, practices, and conditions that led to Korey's death. Indeed, the same neanderthal mentality, practices, and culture that existed in the League prior to Korey's death and that drove him to his death still are subjecting NFL players to serious heat illness.[2] Before and since Korey's death, the NFL has been on notice of the deadly risks created by its unsafe procedures and practices related to hot weather.[3] Given that the League maintains such tight control over teams that the Commissioner's office literally signs off on player and coach contracts and disciplines players for not tucking in their jerseys or pulling up their socks, the fact that players throughout the NFL still

[2] (*See* Exh. 7, p. 3 (August 2, 2001 Boston Globe article documenting one coach's statement that at his team's training camp "the weather hasn't been hot enough for his liking" and another coach's claim that "You need the heat to get into condition"); Exh. 8 (same); Exh. 9 (July 27, 2003 Associated Press article documenting a Green Bay Packer receiver's heat illness, which caused kidney failure and required him to spend a week in the hospital); Exh. 10 (July 27, 2003 Associated Press article describing a Jacksonville Jaguar lineman's collapse due to heat illness, which required him to be hospitalized); Exh. 11 (July 30, 2003 Florida Times-Union article documenting a second Jaguar lineman's heat illness, which also required him to be hospitalized); Exh. 12 (July 30, 2003 Winston-Salem Journal article describing a "spate of heat-related incidents at NFL training camps" in a few days); Exh. 13 (August 7, 2003 Florida Times-Union article detailing a Jacksonville Jaguar receiver's collapse due to heat illness, which also required that he be hospitalized); Exh. 14 (August 5, 2001 Boston Globe article entitled "It's Time To Put The Heat On Coaches"); Exh. 15 (July 31, 2003 Associated Press article documenting heat-related illnesses during 2003 NFL training camps, including hospitalization of 4 Washington Redskins); *compare* NFL guidelines *with* Exh. 16 (Inter-Association Task Force on Exertional Heat Illnesses Consensus Statement).)

[3] (Exh. 17 (August 6, 2001 letter from Creative Football Concepts, Inc. to Commissioner Tagliabue describing the author's fruitless attempt before Korey's death to persuade an NFL representative to take the heat issue seriously); Exh. 18 (July 31, 2003 Chicago Sun-Times article entitled "There's Nothing Cool About NFL Camps"); Exh. 19 (August 5, 2001 New York Times article entitled "In Plain Talk, There Is An Explanation For Stringer's Death").)

are being subjected to the dangerous practices, conditions, treatment, and equipment that contributed to Korey Stringer's death signals a conscious choice by the League to continue exposing players to such unreasonable risks of harm. On behalf of a class of those who are thus placed at risk – all present and future NFL players and their wives and next-of-kin – plaintiff seeks injunctive relief that would eliminate the NFL policies, practices, procedures, equipment, conditions, treatment, and culture that repeatedly subjected Korey Stringer and his family, and that continue to subject hundreds of football players and their families, to unreasonable risks of heat illness and the attendant harm, damage, and loss. This additional relief will ensure that family members who send their loved ones off to NFL training camps, practices, or games will never again have to worry that they will die from heat-related illness.

II. ARGUMENT

A. THE COURT SHOULD CERTIFY THIS LAWSUIT AS A CLASS ACTION PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The United States Supreme Court has held that "[c]lass actions serve an important function in our system of civil justice . . . ." Gulf Oil v. Bernard, 452 U.S. 89, 99 (1981); *accord*, American Pipe & Construction Co. v. Utah, 414 U.S. 538, 550-551 (1974). The Sixth Circuit favors class actions as a means to "achieve the economies of time, effort and expense." Sterling v. Velsicol Chemical Corporation, 855 F.2d 1188, 1196 (6th Cir. 1988); *cf.* In re: American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996).

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974); *accord*, Weathers v. Peters Realty Corp., 499 F.2d 1197, 1201 (6th Cir. 1974). Thus, at the class certification stage, the

substantive allegations of the Complaint are taken as true. Davis v. Avco Corp., 371 F. Supp. 782, 790 (N.D. Ohio 1974).[4] Furthermore, any doubts should be resolved "in favor of allowing the class action." Id. at 791; 7B Wright, Miller & Kane, Federal Practice and Procedure (1986), §1785, p. 199. Plaintiff's class action allegations and detailed factual presentation are sufficient to meet the requirements of Rule 23.

1. The Requirements of Rule 23(a) Are Satisfied.

a. Numerosity

Under Rule 23(a)(1), the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). A strict test does not exist. The "numerosity" requirement compels a case-by-case analysis. In determining numerosity, a trial court may consider reasonable inferences drawn from the factual allegations. Ilhardt v. A.O. Smith Corp., 168 F.R.D. 613, 617 (S.D. Ohio 1996) (no strict numerical test exists to determine when a class is so numerous that joinder is impracticable). In American Medical Systems, Inc.,75 F.3d at 1079, the Sixth Circuit stated that, when class size reaches substantial proportions, the impracticability requirement usually is satisfied by the numbers alone. Id. "Satisfaction of the numerosity requirement does not require that joinder is impossible, but only that plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required." Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 63 (S.D. Ohio 1991) (citations omitted). In Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 105 F.R.D. 506 (S.D. Ohio 1985), the court held that as few as 23 class members satisfied the requisite numerosity. In this case, thousands of individuals spread throughout the United States and beyond comprise the proposed class. This satisfies the numerosity requirement. Hughes v. Cardinal Federal Sav. & Loan Ass'n., 97 F.R.D. 653, 654

[4]*See also* In re Catfish Antitrust Litig., 826 F. Supp. 1019 (N.D. Miss. 1993) ("the invitation to pre-try the case through the vehicle of this (class certification) motion must be respectfully declined...rather, the court's focus on a class certification motion is strictly on the requirements articulated in Rule 23").

(S.D.Ohio 1983) (accepting plaintiffs' estimate). Defendants cannot dispute that the joinder of so many geographically dispersed individuals is impracticable. Id.

b. Commonality

Rule 23(a)(2) requires a showing that there are "questions of law or fact common to the class . . ." Fed. R. Civ. P. 23(a)(2). In this case, the common factual and legal issues include:

a. whether the NFL and its medical consultant Dr. John Lombardo had or have a duty to establish practice regulations and procedures for hot and/or humid conditions in order to prevent or reduce the risk of heat-related illness;

b. whether the NFL and Dr. Lombardo had or have a duty to establish procedures to ensure the proper acclimatization of all players before they participate in full practices;

c. whether the NFL and Dr. Lombardo had or have a duty to establish practices and procedures for the adequate care and monitoring of players suffering heat-related illness;

d. whether the NFL and Dr. Lombardo had or have a duty to require that an adequate heat-related illness history be taken by those providing medical services and/or examinations to players, including players' susceptibility to heat-related illness;

e. whether the NFL and Dr. Lombardo had or have a duty to require teams and their health care providers to take steps necessary to ensure accurate diagnosis and recording of heat-related illnesses among players, so that the condition could be treated in an adequate and timely manner;

f. whether the NFL and Dr. Lombardo had or have a duty to regulate team policies, practices, and procedures regarding matters related to hydration, diet, nutrition, and return-to-practice, insofar as such matters pertain to heat-related illness among players;

g. whether the NFL, its licensing arm NFL Properties, equipment manufacturer Riddell, and Dr. Lombardo had or have a duty to develop, institute, and/or require changes in NFL-licensed and/or NFL-approved equipment including, but not limited to, insulating, evaporation-inhibiting helmets and shoulder pads, to diminish the risk of heat-related illness during practices and games;

h. whether the insulating, evaporation-inhibiting aspects of Riddell's equipment, including, but not limited to, helmets and/or shoulder pads, have substantially contributed to the development of heat-related illnesses among NFL players;

i. whether the NFL and Dr. Lombardo had or have a duty not to subject players to a substandard medical system within the NFL that is composed of athletic trainers, team physicians, and others who are not competent or adequately trained to recognize or treat heat-related illness;

j. whether the NFL and Dr. Lombardo had or have a duty to institute mandatory procedures to ensure proper and timely emergency and other medical care for players so that athletic trainers and physicians would be prepared to deal with the life-threatening situation created by heat-related illness;

k. whether there is a culture among NFL coaches, athletic trainers, and team physicians that subjects players to the conditions such as those to which Korey Stringer was subjected and which led to his death – *i.e.*, being forced to participate fully in practices conducted in extreme heat and humidity while wearing league-mandated, heat-retaining, evaporation-inhibiting equipment, and without proper acclimatization, supervision, or medical care;

l. whether defendants' violations of the above duties have substantially contributed to NFL players' development of heat-related illnesses, the extent to which players have been damaged by such illnesses, the extent to which players' recovery from such illnesses has been inhibited, and any permanent sequelae experienced by players suffering such illnesses, such that injunctive relief is warranted.

Complaint, ¶ 26. "The commonality test 'is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class.'" American Medical Systems, 75 F.3d at 1080; *see* Sterling, *supra*, 855 F.2d at 1197 ("[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible."). Based on the common issues enumerated above, the commonality test is easily satisfied.

c. Typicality

Rule 23(a)(3) requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class

members. De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983); Senter v. General Motors Corp., 532 F.2d 511, 525 n. 31 (6th Cir. 1976). While a representative's claims need not mimic the claims of every class member, the named plaintiff must advance the interests of the class members. American Medical Systems, 75 F.3d at 1082; Ilhardt, 168 F.R.D. at 618. In this case, the named plaintiff's claim is typical in that it arises from the same dangerous procedures, practices, and course of conduct that threatens the health, lives, and livelihood of all of the members of the class. In prosecuting her claim, plaintiff will simultaneously advance the class' interests.

d. Adequacy of Representation

Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). In Senter, the Sixth Circuit articulated two criteria to determine the adequacy of the representation: (1) the representative must have common interests with the unnamed members of the class, and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel. Senter, 532 F.2d at 525. In this case, plaintiff shares a common interest with the class members. No conflict of interest exists between her interests and those of other class members. Ilhardt, 168 F.R.D. at 619; American Systems, 75 F.3d at 1082. By proving her case, she simultaneously establishes the need for class-wide injunctive relief to protect all class members from the same dangerous procedures, practices, and course of conduct that led to her husband's death and that, if unchecked, would harm other class members. Moreover, plaintiff has secured counsel well-qualified in class action litigation to pursue this case.

2. Rule 23(b)(2) Is Satisfied.

Rule 23(b)(2) provides that class certification is appropriate whenever the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Under this rule, "[i]njunctive relief embraces all forms of judicial orders, whether they be

mandatory or prohibitory." 7A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1775, pp. 458-59.

The relief sought in this case includes injunctive relief with respect to the proposed class as a whole. The Complaint seeks the following injunctive relief:

> (i) prohibiting the NFL from compelling players to play and practice in high heat and humidity, or other settings posing a significant risk of heat-related injury, absent policies, procedures and equipment that adequately reduce the risk of such harm, (ii) prohibiting the NFL and NFL Properties from licensing, approving, or mandating or allowing the use of, and enjoining Riddell from furnishing to NFL member clubs, equipment that unreasonably increases players' body temperatures and risks of heat-related illness, and (iii) requiring the NFL and Dr. Lombardo to establish mandatory procedures and programs, including adequate medical monitoring for players and training for players, family members, coaches, athletic trainers, and team physicians to reduce the risk of heat-related illness and to counteract the culture that contributes to it;

Complaint, pp. 22-23.

Rule 23(b)(2) is tailor-made for the detailed, expansive, and court-mandated relief sought in this case. Indeed, that is the only means of protecting class members from suffering the same harm that befell Korey Stringer and his family. "If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2)." 7A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1775, p. 462. Therefore, this Court should certify this case as a class action under Rule 23(b)(2). *See* Fogie v. Rent-A-Center, Inc., 867 F. Supp. at 1403-4; Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669, 678-80 (N.D.Ill. 1989).

III. CONCLUSION

For all of the foregoing reasons, plaintiff respectfully submits that class certification is appropriate under Rule 23(b)(2). Plaintiff therefore requests that this case be certified as a class action.

Respectfully submitted,

/s/ Paul M. De Marco

Stanley M. Chesley, Esq., Ohio ID 0000852
Paul M. DeMarco, Ohio ID 0041153
Louise M. Roselle, Ohio ID 0014844
Renee A. Infante, Ohio ID 0052142
1513 Fourth & Vine Tower
Cincinnati, Ohio 45202
(513) 621-0267
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served via email upon all counsel of record in this case this 25th day of November, 2003.

/s/ Paul M. De Marco